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EMPLOYER'S PROMISE TO REMEDY DEFECT AS AFFECTING ASSUMPTION OF RISK.

SOME COMMENTS ON THE CASE OF THE RIVERSIDE COTTON MILLS V. CARTER.

I have not read the record or briefs in the case of the Riverside & Dan River Cotton Mills *v.* Carter. I have read the opinion and the editorial comment thereon. (18 Va. Law Reg. pp. 66–67.) The query—"Yet is the law as there laid down consistent with exact justice?"—must be answered in the negative. Doubtless the judges themselves, as well as everyone endowed with a sense of justice, must regret the conclusion reached. The editorial seeks to justify the opinion by citing the sound but now discredited axiom, that judges must declare the law as it is—not as it ought to be. The principle upon which the decision in the Carter case is based is, however, so harsh that it demands careful consideration before one can assent to the further statement that the conclusion reached by the court is "sound law as the law stands."

That principle is that an employee who has given notice of a defect in or danger from machinery at or near which he works and has received the promise of his employer to remedy such defect or to remove such danger, cannot recover, despite such promise, if he remain in service an *unreasonable* length of time after notice given. The courts so stating the doctrine admit that it is one "which is not entirely free from doubt and upon which the authorities are not harmonious." (Eureka Company *v.* Bass, 81 Ala. 212-214.)

The lack of harmony in the decisions arises from the length of time the agreement of the employer to remove the danger complained of is said to have to run. Many courts of distinc-

tion hold that the promise lasts for only a reasonable time. Thus in the above cited Alabama case it is said: "The assurances of the employer that the danger shall be removed is an agreement by him that he will assume the risk incident to the danger for a *reasonable time.*" But why should the court limit this assumption of risk by the employer to a reasonable time? Why should it not rather be held a continuing promise until the employer has fulfilled his agreement by removing the danger. This is the view taken by Judge Cooley, who says in his work on Torts: "The master is not in the exercise of ordinary care, unless *or until* he makes his assurances good. Moreover the assurances remove all ground for the argument that the servant by continuing in the employment engages to assume the risks."

The employer does not say to his servant: "I will remove the danger within a reasonable time." What he says is: "I will remove the danger." What right have the courts to put a limit upon this promise of the master that he himself does not limit?

It may be granted that the case would be different where the master says: "I will remove the trouble in ten days." In such case, the decisions hold that, if the injury does not occur within the time specified, the employee will be held to have reassumed the risk and cannot recover. If the employer does not choose to put a time limit on his promise but makes an absolute promise to repair, what right has the court to introduce a new term into the agreement, and say for the master what the master has not said for himself; namely, that he would correct the danger "within a reasonable time."

In the Carter case, where the employee repeatedly refused to reassume the risk as shown by his constantly exacting from his employer promises to correct the danger, should not the court have held that the employer was estopped, as against Carter, from setting up the defense of assumption of risk? Do not these facts insistently demand the application of the familiar principle which precludes a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken by him?

It is upon such grounds of law and equity as well as public policy that many of the courts hold that the liability of the em-

ployer is without any time limit—reasonable or unreasonable. They hold that the facts rebut any presumption of a waiver on the part of the servant. They base their decisions upon the ground of a contract on the part of the employer, implied from the facts that, if the servant continues his service in the meanwhile and until the defects are remedied, the employer and not the servant will assume the risk. (Green *v.* Railroad, 31 Minn. 250.)

In the leading English case of Clark *v.* Holmes, 7 Hurl. & N. 937, 948, another ground of public policy is pointed out. In that case, repelling the idea that the servant releases his master from his negligent refusal to carry out his promise to remove the danger by reassuming the risk, Compton, J., says: "It cannot be made a part of the contract that the master shall not be liable for his own negligence." Yet, we submit, that is just what is done in these cases where the courts relieve the master from the consequences of his negligent failure to carry out his promise.

So, in the May number of "Law Notes," Mr. Charles B. Little asserts the principle to be as follows: "The defense of assumption of risk is only applicable to cases where the conduct of the master has not fallen below 'the standard of care to which he is required to conform;' in other words, where the master has not been guilty of negligence."

The master has clearly fallen below this standard of care where he has failed to carry out his promise to make a dangerous place safe. The employee could not expressly release his master from liability for this negligence. All the more true is it, that he cannot impliedly, by his conduct, release his master from the consequences of such negligence. To do so would be to go in the teeth of the settled public policy of this State which makes all agreements, whether express or implied, to relieve anyone from liability for his own negligence, illegal and void.

To hold that the promise of the master is limited to correcting the danger *within a reasonable time* is to give rise to other anomalies. Thus the master is allowed to prove that he had a reasonable time in which to carry out his promise but that he did not do so. This is to allow a party to plead his own wrongdoing as a defense. On the other hand, the servant is required to

prove that the master was in default but had not, at the time of the injury, had sufficient time in which to make repairs. Decisions which produce such anomalies in the law cannot be sound any more than just.

The true rule is, and ought to be, that the assumption of the increased risk by the master by his promise to repair, whereby the servant is induced to remain, will continue until he fulfills his promise or notifies the servant of his inability or unwillingness to do so. Until such notice is given to the servant, the promise of the master is a continuing one, for neglect of which he is liable. Hough *v.* Railroad, 100 U. S. 226.

There may be cases where such notice might be implied, as where the length of time allowed to elapse has been so great that, together with all the attending circumstances, it might be deemed unreasonable for the servant any longer to rely upon the promise. (The dissenting opinion of Mr. Justice Carter, in the case of the Illinois Steel Co. *v.* Mann, 170 Ill. 212, 213.)

This seems to be the view of the Supreme Court of the United States in the leading case of Hough *v.* Railroad, 100 U. S. 226, where it is said that an employee can recover for an injury suffered within any period which would not preclude all reasonable expectation that the promise would be kept.

A remedy which will avoid in the future such unfortunate results as were reached in the Carter case, it behooves the legal profession, both bench and bar, to discover. Such a remedy is pointed out in the article by Charles B. Little already referred to. He states that, in many of the states, an employee who is injured while working at or near a machine which his master has negligently failed to guard, is by statute entitled to recover. "Such accident happening in several of the states, particularly Indiana, Iowa, Kansas, Louisiana, Michigan, Missouri, Oklahoma, Pennsylvania, Vermont and Washington, the master is precluded from offering the defense of assumption of risk." Such a statute should also provide that the employee cannot waive its benefits.

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